UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMUEL BARTLEY STEELE,	:	
Plaintiff,	:	Civil Action
v.	:	No. 10-11458-NMG
ANTHONY RICIGLIANO, BOB BOWMAN, BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP, BRETT LANGEFELS, CRAIG BARRY, DONATO MUSIC SERVICES, INC., FENWAY SPORTS GROUP a/k/a FSG f/k/a New England Sports Enterprises LLC, JACK ROVNER, JAY ROURKE, JOHN BONGIOVI, individually and d/b/a Bon Jovi Publishing, JOHN W. HENRY, LAWRENCE LUCCHINO, MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P., MAJOR LEAGUE BASEBALL PROPERTIES, INC., a/k/a and/or d/b/a Major League Baseball Productions, MARK SHIMMEL individually and d/b/a Mark Shimmel Music, MIKE DEE, NEW ENGLAND SPORTS ENTERPRISES LLC f/d/b/a Fenway Sports Group f/a/k/a FSG, RICHARD SAMBORA individually and d/b/a Aggressive Music, SAM KENNEDY, THOMAS C. WERNER, TIME WARNER INC., TURNER BROADCASTING SYSTEM, INC., TURNER SPORTS, INC., TURNER STUDIOS, INC., VECTOR MANAGEMENT LLC f/k/a and/or a/k/a and/or successor in interest to Vector Management, WILLIAM FALCON individually and d/b/a Pretty Blue Songs,	:	**LEAVE TO FILE GRANTED ON JANUARY 26, 2011**
Defendants.	:	

REPLY MEMORANDUM OF LAW
ADDRESSING LACK OF PERSONAL JURISDICTION

Defendants Anthony Ricigliano, Donato Music Services, Inc., Brett Langefels and Craig Barry respectfully submit this reply memorandum of law in further support of their motion to dismiss the Verified Complaint herein.[1]

[1] Capitalized terms herein shall have the same meaning as in the Memorandum Of Law In Support Of The Moving Defendants' Motion To Dismiss And For Other Relief. (*Steele III* Docket No. 8.)

I. THE RULE 12(b)(2) DEFENDANTS DID NOT WAIVE A JURISDICTIONAL DEFENSE BY HAVING COUNSEL ACCEPT SERVICE

There is no dispute that none of the Rule 12(b)(2) Defendants were personally served in the Commonwealth of Massachusetts. Rather, Steele argues that by agreeing to waive formal service of the summons and complaint, and having counsel accept service, the Rule 12(b)(2) Defendants waived their jurisdictional defense. This argument defies logic and reason. Further, Steele has no legal support for his position, which defies the words and policy choices implicit in the Federal Rules of Civil Procedure.

Indeed, the Federal Rules expressly provide that "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) *has a duty to avoid unnecessary expenses* of serving the summons." Fed. R. Civ. P. 4(d)(1) (emphasis added). More significantly, the Federal Rules of Civil Procedure further provide that "[w]aiving service of a summons *does not waive any objection to personal jurisdiction or to venue*." Fed. R. Civ. P. 4(d)(5) (emphasis added).

It is clear, moreover, that a counsel's acceptance of service is to be encouraged, not discouraged. If counsel's acceptance of service waived personal jurisdiction or other rights, the practice would likely stop, hardly a desirable result and not without its economic ramifications on the Judicial Branch.[2]

II. RICIGLIANO AND DONATO MUSIC DID NOT WAIVE THE PERSONAL JURISDICTION DEFENSE BY SIGNING A DECLARATION

Steele also fails to cite any relevant cases supporting his argument that Ricigliano and Donato Music somehow waived their right to assert a personal jurisdiction defense by

[2] This lawsuit is one of six pending proceedings Steele has commenced in state and federal court. In this case alone, the Marshals would have been obligated to serve nearly 30 individuals and entities spread across the United States. That is in addition to the more than 20 summonses the Marshals served in *Steele I*, and the six summonses that the Massachusetts Superior Court has authorized the Sheriff to serve at public expense in *Steele IV*.

providing a factual declaration in support of another party's pre-service dispositive motion. First, Steele conflates *signing* a sworn statement with *filing* a document. Although Ricigliano signed a declaration (*Steele III* Docket No. 9), that document was filed by two different defendants, Turner Broadcasting System, Inc. and the Boston Red Sox Baseball Club Limited Partnership. Ricigliano (and certainly not Donato Music) did not make any filing in this lawsuit -- and certainly not a "defensive move" regarding a complaint that had not been served -- until they filed the instant motion to dismiss pursuant to the procedural rules.

Second, Steele fails to cite any case in which a court held that a named yet unserved defendant was precluded from asserting a personal jurisdiction defense simply because that defendant provided a factual declaration in support of another defendant's response to the suit. Indeed, the cases cited in the Opposition (*Steele III* Docket No. 51) do not even come close to addressing this procedural posture, but instead concern situations in which the defendant belatedly objected to jurisdiction *after* appearing in and defending the lawsuit. *See, e.g., Manchester Knitted Fashions, Inc. v. Amalgamated Cotton Garment & Allied Indus. Fund*, 967 F.2d 688, 691-92 (1st Cir. 1992) (filing three procedural motions and entering into a joint stipulation before objecting to venue constituted a waiver); *Marcial UCIN, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983) (filing a notice of appearance and participating in discovery by attending thirteen depositions before asserting a jurisdiction defense constituted a waiver).

III. STEELE DOES NOT ALLEGE SUFFICIENT FACTS JUSTIFYING AN EXERCISE OF JURISDICTION IN MASSACHUSETTS

In his Opposition, Steele attempts to manufacture "Massachusetts connections" by (i) referencing the millions of fans who attended Red Sox games at Fenway Park in 2007 (Opposition at 12); (ii) touting the more than 4 million viewers who watched certain televised post-season games at Fenway Park in 2007 (*id.*); (iii) asserting that the Audiovisual was

allegedly "derived from a Massachusetts author and targeted to Massachusetts residents" and "features a prominent plurality of Boston Red Sox baseball images" (*id.* at 11-12); and (iv) alleging that each of the Rule 12(b)(2) Defendants is "involved in the business of digital multimedia advertising campaigns" and has "years of experience in, and deep knowledge of, the broad scope and far-reach of such campaigns." (*Id. at 12.*) None of those facts (even if assumed to be true) connect the Rule 12(b)(2) Defendants -- four specific non-resident defendants -- to Massachusetts.

As to Ricigliano and Donato Music: Steele identifies no *facts* supporting a finding that Ricigliano and Donato Music have any contacts *with Massachusetts* related to the alleged tortious conduct at issue in this case. (*See id.* at 13-16.) Steele's speculative allegations (not even asserted "on information and belief") that the Rule 12(b)(2) Defendants purportedly "cleared" the Audiovisual, or maintain "routine contact with the Commonwealth through commercial distribution and broadcasts" are conclusory on their face and simply insufficient to support an assertion of personal jurisdiction. (*Id.* at 16.) The latter alleged conduct, even if true, has nothing to do with the allegations in this case. *Hannon v. Beard*, 524 F.3d 275, 282 (1st Cir. 2008) (recognizing that "the first step to achieving personal jurisdiction is that a claim *must arise out of, or be related to,* the defendant's in-forum activities" (emphasis added) (internal quotation marks omitted)).

As to Langefels and Barry: Steele identifies no *facts* supporting a finding that Langefels and Barry have any contacts *with Massachusetts* related to the specific conduct at issue in this case. (*See id.* at 17-18.) Steele alleges that Langefels is a senior editor who "*personally edited*" the Audiovisual, and that Barry was the creative director who produced the Audiovisual. (*Id.* at 17.) Steele therefore postulates that "it is difficult to think of two individual

Defendants -- director and editor -- more directly involved in the production of the infringing MLB Audiovisual . . . and, therefore, most likely to have reproduced the Steele Team sound recording as alleged in Steele's Complaint." (*Id.* at 18 (alteration in original) (internal quotation marks omitted).) Even if those allegations were true, here again Steele fails to allege *facts* in any way jurisdictionally sufficient to connect Massachusetts to the alleged conduct of Langefels and Barry while they were in Georgia, pursuant to their professional responsibilities for their Georgia employer, concerning another non-Massachusetts business entity's nationwide advertising.

* * *

The legal authorities Steele cites likewise do not help his cause. For example, in *New England College v. Drew University*, the court expressly stated that it "is not -- and in fact is not permitted to be -- persuaded by a jurisdictional argument based on speculation without any evidentiary foundation." No. 08-cv-424-JL, 2009 WL 395753, at *2 (D.N.H. Feb. 17, 2009) ("While the court must accept [jurisdictional] evidence proffered by the plaintiff as true, courts do not credit conclusory allegations or draw farfetched inferences." (internal quotation marks omitted)). Reliance on baseless speculation and "farfetched inferences" is precisely what Steele is asking this Court to do. Similarly, Steele cites *Marks v. Polaroid Corp.*, 237 F.2d 428, 435 (1st Cir. 1956) for the proposition that an "employee may be subject to personal jurisdiction based on the infringing acts of their employer if he is a 'moving, active, conscious force behind the infringement.'" (Opposition at 17-18). Steele's characterization of the First Circuit's holding is both misleading and wrong, as the *Marks* case does not even address personal jurisdiction. Indeed, the word "jurisdiction" appears *nowhere* in the *Marks* opinion because it concerns, among other things, whether an individual could be held personally liable for a corporate entity's patent infringement. *Marks*, 237 F.2d at 435.

In sum, Steele falls far short of alleging "abundant facts to warrant personal jurisdiction." (*See* Opposition at 9.)

IV. THE COURT SHOULD DENY STEELE'S REQUEST TO CONDUCT JURISDICTIONAL DISCOVERY

The First Circuit has held that the "standard for reversing a district court's decision to disallow jurisdictional discovery is high." *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625-26 (1st Cir. 2001) (affirming denial of jurisdictional discovery where the district court assessed the plaintiff's proffered jurisdictional showing as "bootless"). Indeed, the First Circuit has held that a ruling denying jurisdictional discovery "will be overturned only upon a clear showing of manifest injustice, that is, where the lower court's discovery order was *plainly wrong* and resulted in substantial prejudice to the aggrieved party." *Id.*

Although a diligent plaintiff "who makes out a *colorable case* for the existence of *in personam* jurisdiction may well be entitled to a modicum of jurisdictional discovery," that "entitlement is not absolute." *Id.* Thus, a plaintiff cannot "simply rely on the averments of the complaint, but is put to a factual test of his jurisdictional claim." *Noonan v. Winston Co.*, 902 F. Supp. 298, 306-07 (D. Mass. 1995) (denying plaintiff's motion for jurisdictional discovery reasoning his quest for jurisdiction would be futile), *aff'd* 135 F.3d 85, 95 (1st Cir. 1998).[3]

The Verified Complaint fails to assert any facts supporting an exercise of jurisdiction in Massachusetts over the Rule 12(b)(2) Defendants. As set forth above, Steele has failed to allege any facts demonstrating any contact between the Rule 12(b)(2) Defendants and

[3] Steele's reliance on *Blair v. City of Worcester*, 522 F.3d 105 (1st Cir. 2008) is misplaced. In *Blair*, the First Circuit held that "where a plaintiff can demonstrate the existence of *a plausible factual disagreement or ambiguity*, our jurisprudence favors permitting the litigants the opportunity to flesh out the record." *Id.* at 111 (emphasis added). The *Blair* plaintiffs "mustered evidence" in support of their contention that service was properly effected and, as a result of this "circumstantial evidence adduced by the plaintiffs," the First Circuit remanded for limited jurisdictional discovery. *Id.* at 112-14. Steele has made no such showing of a "plausible factual disagreement or ambiguity" justifying jurisdictional discovery in this case.

Massachusetts, nor has he provided any reason to suggest that allowing limited jurisdictional discovery would demonstrate otherwise.

In support of his argument requesting jurisdictional discovery, as to Ricigliano and Donato Music, Steele conclusorily asserts that they "assisted their co-defendants in 'clearing' the MLB Audiovisual, or any of several derivatives and/or draft versions thereof, which process necessarily involved reproducing the Steele Team Song recording." (*See* Opposition at 19.) Steele fails to explain how that statement in any way connects Ricigliano and Donato Music to Massachusetts.

As to Langefels and Barry, Steele conclusorily asserts that their alleged "'hands on' involvement in the production of the MLB Audiovisual provides some of the strongest connections to Massachusetts" -- all of which are unspecified -- because the Audiovisual was allegedly "copied and derived form the work of a Massachusetts resident, focused heavily on the Boston Red Sox (including video footage of not only the Red Sox, but also of Boston street scenes, obviously filmed in Massachusetts), and unquestionably caused tortious harm to a Massachusetts resident while also otherwise impacting the economic life of Massachusetts." (*See id.*)

Steele appears to have overlooked the maxim that the personal jurisdiction analysis focuses on the activities of the *defendant.* (*See* Memorandum In Support Of Defendants Anthony Ricigliano, Donato Music Services, Inc., Brett Langefels and Craig Barry's Motion To Dismiss The Verified Complaint at 7-8 (*Steele III* Docket No. 39).) Not surprisingly, Steele fails to address the cases the Rule 12(b)(2) Defendants cite for this basic jurisdictional proposition. Undaunted, Steele nevertheless fails to explain how a video featuring images, among numerous others that have nothing to do with Massachusetts, relating to a Massachusetts sports team

allegedly based on a song by a Massachusetts resident in any way affects whether a defendant has contacts with Massachusetts that are jurisdictionally (*i.e.*, constitutionally) sufficient to warrant the exercise of this Court's personal jurisdiction.

Based on mere speculation and a scant supporting record, Steele's request for jurisdictional discovery fails to overcome the "not frivolous" standard Steele advocates. (*See id.* at 18.) But the First Circuit does indeed require more, *see Swiss Am. Bank*, 274 F.3d at 626-27 (recognizing that "[f]ailure to allege specific contacts, relevant to establishing personal jurisdiction, in a jurisdictional discovery request can be fatal to that request"), and this Court should deny Steele's request for a license to conduct speculative discovery that is designed to achieve little more than provide an opportunity to further harass and burden the Rule 12(b)(2) Defendants -- or, for that matter, "any Defendant over whom this Court may question its jurisdiction." (*See* Opposition at 20.)

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Rule 12(b)(2) Defendants' opening brief (*Steele III* Docket No. 38) and the memorandum filed in support of the Moving Defendants' Motion To Dismiss And For Other Relief (*Steele III* Docket No. 8), the Court should grant the Rule 12(b)(2) Defendants' Motion To Dismiss The Verified Complaint.

Dated: January 27, 2011
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule

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CERTIFICATE OF SERVICE

I, Christopher G. Clark, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on January 27, 2011.

Dated: January 27, 2011

/s/ Christopher G. Clark
Christopher G. Clark